IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 103 of 1988
WITH
FIRST APPEAL No 108 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.R.CALLA Sd/-
and
Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

First Appeal No. 103 of 1988.
The State of Gujarat Vs. A.A.Pathan.
Appearance:
Mr.Umesh Trivedi, AGP. for Appellant.
Mr.G.T.Dayani with Ms.Maya N.Bhavnani
for Respondent.

First Appeal No. 108 of 1988.
A.A.Pathan Vs. The State of Gujarat.
Appearance :
Mr.G.T.Dayani with Ms.Maya N.Bhavnani
for Appellant.
Mr.Umesh Trivedi, AGP. for Respondent.

CORAM : MR.JUSTICE M.R.CALLA
and
MR.JUSTICE D.A.MEHTA

Date of decision: 20/01/2001

CAV COMMON JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

First Appeal No.103 of 1988.

1. This is an appeal filed by the State of Gujarat against the judgment and decree dated 27.05.1987 passed in Special Civil Suit No. 7 of 1984 by the 2nd Jt. Civil Judge (S.D), Ahmedabad (Rural). The respondent (original plaintiff) filed a suit against the State of Gujarat seeking a decree to recover the amount of Rs.15,01,411/- together with costs and interest. The suit was decreed in favour of the plaintiff to the extent of Rs.7,76,411/- together with costs and interest at the rate of 18% p.a. from the date of the suit till realisation. In the aforesaid appeal the State is the appellant in relation to the decretal amount while in First Appeal No.108 of 1988 the respondent-plaintiff has come up in appeal seeking to enhance the decretal amount by a total sum of Rs.7,25,000/-.

2. The Executive Engineer, Godhra (B&C) Division invited tenders from the public for the work of constructing approach to overbridge at level crossing no.45 on Dahod-Zalod-Banswada road. The plaintiff respondent filled up the tender amounting to Rs.54,13,295.25 ps. as against estimated cost of Rs.37,80,723/-. The tender submitted by the plaintiff-respondent being the lowest was accepted and a regular agreement was entered into in B-2 Form bearing agreement no.B.2/65 of 1979-80. The plaintiff-respondent was issued a work order on 15.3.1980 and the work was required to be completed within a period of 30 months from the said date as per terms of the agreement i.e. on or before 15th. September,1982.

3. The basic case of the plaintiff-respondent is that the contract in question created certain mutual bilateral and reciprocal contractual obligations which are required to be performed by both the sides to the contract and that the department having failed to perform its reciprocal part of the contractual obligations, a fundamental breach of the contract was committed preventing the plaintiff-respondent from fully or partly completing the work in question. The say of the plaintiff-respondent was that the department could not supply the site land in view of the injunction granted by the Court from 4.7.1980.

4. In view of this situation, the plaintiff sued the defendant State claiming recovery of the following amount in respect of each of the items as detailed below respectively :

(A) Rs.1,53,911/- amount of security deposit.

(B) Rs. 42,500/- amount of work done and not paid.

(C) Rs.5,80,000/- loss of profit at the rate of 20% on the remaining unexecuted work of Rs.29,00,000/-

(D) Rs.2,00,000/- on account of compensation.

(E) Rs.5,25,000/- on account of extra item

Rs.15,01,411/-.

5. The Trial Court framed the following issues in connection with the dispute brought before it and answered each of the issue as shown against each of them:

(1) Whether the plaintiff proves he entered into an agreement bearing no.1/B/2/65 of 1979-80 ?	Affirmative
(2) Whether the plaintiff proves that defendant has committed fundamental breach of contract bearing No.B/2/65 of 1979 - 80 ?	Affirmative
(2A) Whether the defendant proves that the suit of the plaintiff it is bad for non-joinder of necessary parties ?	Negative
(2B) Whether the defendant proves that the plaintiff has no cause of action to file the present suit against them ?	Negative
(3) Whether the plaintiff is entitled to recover the amount of Rs.	In the affirmative for the following

15,01,411.00 as an claims.
amount of security Rs.1,53,911/-amount of
deposit loss of profit security
and amount of work done deposit.
as contended in para 12 Rs. 42,500/-amount of
and 15 of the plaint? work done
and not
paid.
Rs.5,80,000/- Loss of
profit at
the rate of
20% on the
remaining
unexecuted
work of Rs.
29,00,000/-.

Negative : For the following claims :-

Rs.2,00,000/- on account
of compen-
sation.

Rs.5,25,000/- on account
of extra
item.

(4) What order and decree ? As per final order.

6. In so far as the finding in relation to the first and second issues are concerned viz.,whether there was an agreement entered into by the plaintiff as stated and whether the defendant State had committed fundamental breach of such contract; the Trial Court has found that there is no controversy at all between the parties with regard to the execution of the agreement which was produced below exh.39. In so far as the second issue regarding breach of contract, the Trial Court has found the following facts after appreciating the relevant and cogent evidence on record - that as admitted by the defendant in written statement at exhibit 16 site land to the extent 1970 mtrs. on Dohad side could not be given to the plaintiff as injunction of the Civil Judge (S.D), Godhra was operating from 4.7.1980. That the contract which had been entered into on 15.03.1980 was to be completed on or before 15.09.1982. However, in relation to the land in question for which injunction was in

force, the litigation was carried upto High Court and the State of Gujarat could obtain the decision in its favour only on 01.03.1983. Even thereafter, this aspect was communicated to the plaintiff-respondent by the department only on 07.08.1983 and in that communication it was mentioned that the process of taking possession of the disputed land from the land occupiers by Dahod Nagarpalika was in progress. Therefore, the plaintiff-respondent was able to prove in the Trial Court that the department had failed to hand over the possession of the land to the contractor in respect of the disputed land and therefore the remaining work could not be completed.

7. The plaintiff relied upon section 53 of the Indian Contract Act to show that in case of contract containing reciprocal promise and failure of one party to the contract where such failure would prevent other party from performing its part of the contract, such contract would become voidable at the option of the party so prevented and such party would be entitled to compensation from the other party for any loss which would be occasioned in consequence of the non-performance of the contract. As against this, on behalf of the defendant State, the District Government Pleader relied upon section 56 of the Indian Contract Act for the purposes of contending that an agreement to do an act which is impossible in itself is void i.e. after a contract is entered into if it becomes impossible or by reason of some event which the promisee cannot prevent, the contract becomes void as the act to be performed becomes impossible or unlawful. Clause 39 of the tender agreement was also relied upon on behalf of the defendant State to show that no compensation was allowable for any delay caused in the starting of the work on account of acquisition of land or in case of clearance works on account of any delay in granting sanction to estimates.

8. The Trial Court after taking into consideration the provisions as well as relevant clauses of the contract in question appreciated the evidence in the form of correspondence, documents and depositions of witnesses and has come to the conclusion that the plaintiff respondent was entitled to exercise the option available under section 53 of the Contract Act, the department having committed fundamental breach of the contract in view of its inability to supply the site and thus creating situation where it would not be possible for the plaintiff to carry out the work in question. In relation to applicability of section 56 of the Contract Act it is not a case where a situation arose after the contract was

entered into, though it was contended before us by the learned Assistant Government Pleader that this was in fact the situation viz. after the contract was entered into on 15.03.1980 the Civil Court granted injunction only on 4.7.1980. However, it has been found from the facts and evidence on record, that there was encroachment on the site land even prior to the point of time when the contract was entered into and thus it was not that this situation came into existence after the contract was entered into. The learned Assistant Government Pleader then contended that as per terms of the agreement the contractor was given site inspection even prior to the contract being entered into and that he was aware of the fact situation and he had raised no objection at that point of time. The short reply to this contention is that it was for the department to supply the land in question and if they were aware that the land was occupied by encroachers it was for the department to make necessary arrangement for clearing the site land of such encroachment well within the time and it could not be heard to say after the contract was entered into that it was by reason of event which happened after the contract was entered into that made fulfilling of the promise under the contract impossible. In so far as the applicability of clause 39 is concerned the self same reasons would apply i.e. it was not that any delay had been caused in starting of the work on account of acquisition of land, because no delay had been caused in starting of the work on account of the acquisition of land in as much as the contractor had already completed the work worth almost Rs.25 lacs when the difficulty arose, and for such work there being no dispute the defendant State had already made the payments as per terms of the contract to the plaintiff contractor.

9. It is in light of the aforesaid facts, circumstances, evidence and relevant provisions of law that the Trial Court has correctly come to the conclusion that fundamental breach of contract had been committed by the defendant State enabling the plaintiff respondent to exercise its statutory option available under section 53 of the Contract Act.

10. The amount of security deposit has been decreed by the Trial Court in favour of the plaintiff to the extent Rs.1,53,911/-. It has been found from the evidence on record that the plaintiff had deposited the amount by way of the following three fixed deposit receipts towards due performance of the contract :

1 F.D.R.No.001174 of Bank of Baroda, Godhra branch amounting to Rs.37,811/-.

2 F.D.R.No.001277 of Bank of Baroda, Godhra branch amounting to Rs.38,100/-.

3 F.D.R.No.002687 of Bank of Baroda, Godhra branch amounting to Rs.80,000/-.

Total Rs. 1,55,911/-.

11. It has been further found that the original defendant viz. the State of Gujarat has not disputed the quantum of amount under this head but it has been contended that, as per terms of the contract, the security deposit can be refunded only on completion of the work within a period of three months after the payment of the final bill. In this connection, the Trial Court has observed that till date of the decision of the suit the final bill had not been prepared either by the department or by the plaintiff and hence, the said clause of the contract on which reliance was placed by the department could not be brought into play, for the simple reason that in view of the fundamental breach of the contract, the contract was no longer subsisting and as such there was no occasion for preparation of final bill in view of the fact that the plaintiff contractor was not in a position to complete the work. The Trial Court has further found in this context that it is not a case of the department that the security deposit in question was required to be forfeited.

12. In this connection, the plaintiff relied upon the following three decisions viz.[i] AIR 1963 SC pg. 1405, Fateh Chand Vs. Balkishan Dass, [ii] AIR 1973 (Guj.) pg.256, M/s.Variety Body Builders vs. The Union of India, and [iii] AIR 1970 SC pg.1955, Maula Bux Vs. Union of India. The said decisions are not applicable here in view of the fact that in all the three decisions the Court was called upon to decide as to in what circumstances the forfeiture of the amount paid as security for securing due performance of the contract can be permitted to the party complaining the breach of the contract. As already held herein before, in the present case it is the State Government department which has committed the fundamental breach of the contract and as such there is no case made out by it seeking forfeiture of the security deposit. The reason is simple enough, in as much as the party which commits breach of contract is required to be penalised by way of forfeiture of security deposit or in other words compensate the other party

against whom the breach is committed for a damage actual or otherwise suffered by such party in consequence of the breach of the contract. Here, it is the appellant viz. the original defendant who has committed the breach of contract and in view of these circumstances, the security deposit held by it has to be returned to the plaintiff contractor viz. the respondent herein. Therefore, the finding and the order of the Trial Court to return the amount of security deposit with accrued interest cannot be found fault with and hence we do not interfere with the same.

13. In so far as the second claim of Rs.42,500/- is concerned, the same pertains to the amount for the work done and not paid. The Trial Court has found as a matter of fact that the quantum of the claim has not been disputed by the defendant State in the written statement but the only contention raised on behalf of the State was that suitable rates would be paid taking into consideration the specifications of the work done. Therefore, the undisputed facts are that the claimant plaintiff had carried out the work in question and he was paid only part rates i.e. not at full tender rate and as he had not been paid fully for the work done the balance amount was due and payable to the plaintiff contractor. A part of the bill was held back only to ascertain whether the work had been done in accordance with the tender specifications and nothing has been brought on record to show that a particular work was defective or was not in accordance with the requisite specifications as mentioned in the tender. Moreover it has not been shown, much less established by the original defendant department that any part of the work was incomplete. In fact, to the contrary, one Shri T.S.Dharamsi, the defendant's witness has very specifically stated in his evidence under exhibit 91 that the plaintiff contractor had carried out the work in good manner at Jhalod site. On behalf of the plaintiff evidence was led before the Trial Court and the same is reproduced in para 30 of the judgment under appeal wherein details of specific item, quantity and the rates applicable for the work done are mentioned. It has been found by the Trial Court from the evidence on record that though the plaintiff was entitled to a sum of Rs.66,635.18 ps. the claim was made only to the extent of Rs.42,500/- for the amount of work done and not paid and as such the Trial Court has held and decreed that the plaintiff respondent was entitled to recover the amount of Rs.42,500/- together with the interest at the rate of 18% p.a. from the appellant. We have found no reason and none has been shown to us to interfere with the findings of facts recorded by the Trial Court based

on the appreciation of evidence on record.

14. The third claim which has been held in favour of the plaintiff contractor by the Trial Court pertains to loss of profit. An amount of Rs.5,80,000/- has been awarded to the plaintiff at the rate of 20% of Rs. 29 lacs being the unexecuted work which remained to be executed as a consequence of the breach committed by the department. On behalf of the plaintiff contractor, it was pointed out before the Trial Court that the tender was for an amount of Rs.54,13,295.25 ps. as against the estimated cost of Rs.37,80,723.50 ps. In other words, the plaintiff contractor's tender was 43.18% more than the estimated cost and it was submitted that this excess would take within its sweep an estimated profit at the rate of 20%. It was further urged that the plaintiff contractor had already been paid Rs.24,82,758/- towards the part of the work completed out of the total tender contract and thus the balance of unexecuted work which the contractor would have completed if the breach had not been committed by the State, would amount to Rs.29,30,537/taking a round figure of Rs.29,00,000/- as unexecuted work on applying the rate of 20% as expected peofits from such an unexecuted work of Rs.29,00,000/- a claim of Rs.5,80,000/- was made before the Trial Court. In support of such claim in the oral deposition by Shri A.A.Pathan, the plaintiff, it has been submitted under exhibit 38 that he is an income tax payer and his profit on the contract business has been assessed by the Income Tax Department at the rate of 20% to 21% or 22%. On the basis of the aforesaid claim, the Trial Court has accepted the same and granted a sum of Rs.5,80,000/towards loss of profit.

15. The following three decisions were relied upon in support of finding arrived at by the Trial Court by the learned Counsel for the respondent before us.

1 AIR 1977 SC pg.1481 - Mohd Salmatullah and others Vs. Government of Andhra Pradesh.

2 AIR 1984 SC Pg.1703 - M/s. A.T.Brij Paul Singh and Bros. Vs. State of Gujarat.

3 AIR 1999 SC Pg.1031 - Dwarka Das Vs. State of Madhya Pradesh.

16. In view of the fact that the earlier two decisions have been taken into consideration by the Apex Court in the third decision reported in AIR 1999 SC Pg.1031, we refer to only that decision. It has been

held by the Apex Court

" that damages can be claimed by a contractor where the government is proved to have committed breach by improperly rescinding the contract and for estimating the amount of damages Court should make a broad evaluation instead of going into minute details. It was specifically held that where in the works contract, the party entrusting the work committed breach of contract, the contractor is entitled to claim the damages for loss of profit which he expected to earn by undertaking the works contract. Claim of expected profits is legally admissible on proof of the breach of contract by the erring party. It was observed (at p.1707 of AIR 1984 S.C.) :'What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15 per cent of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit. We are therefore, of the opinion that the High Court was in error in wholly rejecting the claim under this head.

Now if it is well-established that the respondent was guilty of breach of contract inasmuch as the rescission of contract by the respondent is held to be unjustified, and the plaintiff-contractor would be entitled to damages by way of loss of profit. Adopting the measure accepted by the High Court in the facts and circumstances of the case between the same parties and for the same type of work at 15 per cent of the value of the remaining parts of the work contract, the damages for loss of profit can be measured'.

To the same effect is the judgment in Mohd. Salamatullah V. Government of Andhra Pradesh, AIR 1977 SC 1481. After approving the

> grant of damages in case of breach of contract, the Court further held that the appellate Court was not justified to interfere with finding of fact given by the trial Court regarding quantification of the damages even if it was based upon guess work. In both the cases referred to hereinabove, 15% of the contract price was granted as damages to the contractor. In the instant case however the trial Court had granted only 10% of the contract price, which we feel was reasonable and permissible, particularly when the High Court had concurred with the finding of the trial Court regarding breach of contract by specifically holding that ' we therefore see no reason to interfere with the finding recorded by the trial Court that the defendants by rescinding the agreement committed breach of contract.' It follows therefore as and when the breach of contract is held to have been proved being contrary to law and terms of the agreement, the erring party is legally bound to compensate the other party to the agreement...."

17. Therefore, applying the ratio of the aforesaid decision one can say that a contractor is legitimately entitled to claim damages for loss of profit which he expected to earn when he undertook such contract but what would be the measure of profit would depend upon the facts and circumstances of the each case. In the present case, though the Trial Court has referred to oral deposition of the plaintiff regarding assessment of profits from contract business by Income tax Department at the rate of 20% or so, no evidence in support of such assertion has been led. Even at the time of hearing, we inquired of Shri G.T.Dayani, learned Counsel for the respondent to produce before us the assessment records of the contractor. However, he was not in a position to produce the same nor was he in a position to state with certainty as to what was the rate of profit adopted by the contractor in relation to the amount of Rs.25,00,000/- approximately which had already been paid towards work done in relation to this very contract. Therefore, in absence of any specific evidence in support of the plaintiff's claim as to 20% of rate of profit, we feel that rate of 10% would be appropriate and meet the ends of justice. We are fortified in our view and derive support from the fact that legislature has statutorily provided in case of contractors that a rate of 8% of the gross receipts shall be deemed to be the profits under section 44AD of the Income tax Act,1961. Albeit this

section has been brought on statute book only from 1.4.1994, yet it provides guidance for making a reasonable estimate in absence of any cogent evidence on record.In view of these circumstances, the third claim which has been adjudged and decreed at a sum of Rs.5,80,000/- being 20% of Rs.29,00,000/- is modified to the aforesaid extent i.e. expected profit shall be taken at a rate of 10% of the unexecuted portion of the tender contract viz. Rs.29,00,000/-, and therefore, the appeal of the State shall stand allowed to the aforesaid extent.

FIRST APPEAL NO.108 OF 1988.

18. This appeal arises in relation to claims which have been rejected by the Trial Court viz. Rs.2,00,000/on account of compensation towards the loss suffered for carrying out some portion of the work in lime mortar instead of cement mortar and (ii) Rs.5,25,000/- on account of extra items of work as narrated in para 11 of the plaint.

19. In relation to the first claim, it is the say of the plaintiff that due to non supply of cement by the department, the plaintiff was required to carry out the work under items no. 5 and 6 in lime mortar, and therefore, the plaintiff was required to undergo additional expenses. It is the say of the plaintiff that he had made payment in advance towards the purchase of lime but before he could take delivery of such lime the department arranged for cement and asked to carry out the work in cement mortar as was originally agreed upon in the contract. It is the say of the plaintiff contractor that though he carried out the work in cement mortar, he could not recover the advance payment made by him for purchase of lime and therefore loss of Rs.2,00,000/incurred by him in these circumstances was required to be compensated. The plaintiff has relied upon the deposition of defendant witness Shri T.S.Dharamsi and Shri M.R.Patel under exhibits 91 and 95 respectively wherein they have admitted that there was some shortage of cement in the year 1980 and as such the department permitted the plaintiff to use lime mortar instead of cement mortar. However, as against this, on behalf of the defendant-State evidence was led by way of letter dated 12.05.1980 (exh.83) which was written by the plaintiff to the department wherein specific averment was made to the effect that " he will not claim any extra rate for doing the work in lime mortar instead of cement mortar". The Trial Court has reproduced the exact Gujarati version. In view of this specific undertaking given by the plaintiff the Trial Court has held that on

the basis of the said documentary evidence it was not in a position to accept the contention on behalf of the plaintiff that it was at the instance of the department that the plaintiff had agreed to carry out the work in lime mortar instead of cement mortar and was entitled to compensation for loss in the circumstances narrated before. Having heard both the sides we find no reason to interfere with the order of the Trial Court, same having been arrived at after taking into consideration the relevant evidence and submissions made before it, because even if the work was to be carried out as directed by the department, yet, the plaintiff contractor having agreed not to charge for the same cannot be now permitted to do so.

20. In so far as the second claim of Rs.5,25,000/on account of extra items of work carried out by the plaintiff is concerned, it is the say of the plaintiff that in relation to tender item no.6 which is reflected in schedule "B" of the tender, total quantity under this item is 12658 MT and the tender rate fixed in respect of the same is Rs.175/- per CMT. It is further the case of the plaintiff that at the time of execution of this work, Engineer at site of the defendant had got the masonry work done in first grade and that the engineer had power to make such alteration under clause 14 of the tender; that the plaintiff could not raise any objection at the time of execution of work as the work had to be completed in time, but the plaintiff wrote a letter to the Executive Engineer on 17.02.1981 demanding extra rate of Rs.75/- per CMT over and above the tender rate of Rs.175/- per CMT. It was urged that item no.6 specified in schedule "B" of the tender was required to be carried out in second grade masonry work but the same had been got executed in first grade and as such the plaintiff was entitled to higher rate as he was required to incur extra costs. That as the department had only paid the tender rate of Rs.175/- per CMT the plaintiff claimed additional amount of Rs.75/- per CMT on the executed quantity of work of 7000 CMT. The department's say is that as per the terms of the contract only second grade work was to be carried out by the plaintiff, and in fact, the masonry work carried out by the plaintiff was only of the second grade and there is no change for which the plaintiff could claim the excess amount. The Trial Court has taken into consideration that the plaintiff in his deposition (exhibit 38) has fairly admitted in cross-examination that there was no documentary evidence to show that the work carried out was in first grade; that the plaintiff has not brought on record any evidence to show at whose instance he had carried out the work in first grade, even

when he was aware of the terms of the tender contract which required such work to be carried out in second grade. The plaintiff produced evidence of expert witness along with photographs which have been exhibited vide exhibits 88 and 89 as well as documentary evidence in the form of figures and drawings printed in P.W.D. Hand Book Volume No.1. On behalf of the defendant Shri T.S.Dharamsi and Shri Maheshchandra Ramanlal Patel submitted evidence by way of oral deposition and in their deposition, they have categorically stated that item no.6 of second schedule of the tender was stone masonry work of second grade, that the department had never informed the plaintiff to carryout such masonry work in first grade, that the photographs (exhibits 88 and 89) produced by the witness specifically show that the work in question was of second grade.

21. The Trial Court after taking into consideration the various pieces of evidence brought before it has come to the conclusion that the plaintiff has failed to establish that masonry work being item no.6 of the tender contract carried out by him was of first grade. That in absence of any single evidence to show that such masonry work was of first grade it was not possible to accept the claim of the plaintiff because even at the time of preparation of payment of R.A.Bills no objection had been taken as to why the payment of masonry work was being made on the basis of the second grade work. The Trial Court has further taken pains to compare photographs (exhibits 88 and 89) with the specification drawings in the P.W.D. Hand Book Volume 1 and as a result came to the conclusion that masonry work which is shown in the exhibited photographs was not of first grade but was of second grade and hence the plaintiff was not entitled to the claim of Rs.5,25,000/- on account of extra items.

22. To summarise : we hold that (i) State of Gujarat committed fundamental breach of contract, (ii) the contractor was rightly held entitled to return of security deposit of Rs.1,53,911/-, (iii) the contractor was rightly held entitled to sum of Rs.42,500/- towards the amount of work done and not paid (iv) the contractor was rightly held entitled to loss of profit expected out of unexecuted portion of tender work but the rate of profit for such remaining unexecuted work shall be 10% of Rs.29,00,000/- i.e. claim of Rs.5,18,000/- allowed by the Trial Court will stand modified to the sum of Rs.2,90,000/- under this head, (v) the Contractor was rightly held as not being entitled to Rs.2,00,000/- on account of compensation and (vi) the contractor was rightly held not entitled to Rs.5,25,000/- on account of

extra items.

23. In view of what is stated hereinbefore, after carefully taking into consideration the submissions of both the sides as well as evidence on record and having gone through the Records and Proceedings of the case, we partly allow First Appeal No.103 of 1988 filed by the State of Gujarat to the extent as stated hereinbefore and dismiss First Appeal No. 108 of 1988 filed by Shri A.A.Pathan, Government Contractor.

Sd/- Sd/-

(M.R.Calla, J) (D.A.Mehta,J)

m.m.bhatt